No. 76-760

In the Supreme Court of the United States

OCTOBER TERM, 1976

LUTHER ALBERT JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner challenges the correctness of the refusal of the courts below to enjoin the collection of a wagering tax assessment against him.

The pertinent facts are as follows: Petitioner brought this suit in the United States District Court for the Western District of Kentucky to enjoin the collection of a $929,600 wagering excise tax assessment against him covering the period July 1, 1968 through September 30, 1972. After consideration of affidavits filed by the parties, the district court granted summary judgment to the government on the ground that the action was barred by the Anti-Injunction Act, 26 U.S.C. 7421(a) (Pet. App. A 1a-8a). That statute provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." The court of appeals affirmed (Pet. App. C 10a-11a). On March 22, 1976, this Court

granted certiorari, vacated the judgment of the court of appeals and remanded the case for further consideration in light of *Commissioner* v. *Shapiro*, 424 U.S. 614 (Pet. App. D 12a) (424 U.S. 960).

On remand, the court of appeals held that the affidavits filed by the government in support of its motion for summary judgment were sufficient to demonstrate that the assessment had a basis in fact. The court of appeals therefore reaffirmed its original decision that petitioner was not entitled to injunctive relief because he had failed to establish either (1) that the government could not prevail under any circumstances or (2) that equity jurisdiction exists because of the threat of irreparable injury for which there is no adequate legal remedy (Pet. App. E 13a-17a). See *Enochs* v. *Williams Packing Co.*, 370 U.S. 1.

1. Petitioner first argues (Pet. 8-12) that the decision below conflicts with *Commissioner* v. *Shapiro*, 424 U.S. 614. There, the Court held that the Anti-Injunction Act did not bar a suit to enjoin the assessment or collection of taxes solely on the basis of the Commissioner's allegation of an unpaid tax. In so holding, the Court observed that "[t]he Government may defeat a claim by the taxpayer that its assessment has no basis in fact * * * [by means of] [a]ffidavits * * * so long as they disclose basic facts from which it appears that the Government may prevail" (*id.* at 633).

Unlike *Shapiro*, where the government did not provide any explanation of its assessment against the taxpayer, in this case the government filed affidavits in the district court that established that the tax assessment against petitioner had a factual basis. These affidavits showed that petitioner had been engaged in the business of accepting wagers and that he had received average gross daily wagers of $7,000, six days a week, from July 1, 1968, through September 30,

1972.[1] These projections yielded the unpaid $929,600 wagering tax assessment (see Pet. 3-4). As the court of appeals pointed out (Pet. App. E 17a), the sworn statements in the government's affidavits were buttressed by the fact that at the time petitioner brought this action he had already pleaded guilty to one count of an indictment charging him with conspiring to violate federal gambling laws. Since petitioner had done nothing more than make conclusory allegations that the government could not prevail on the merits of its claim (see Pet. App. E 17a), the decision below properly held that the Anti-Injunction Act barred this suit.[2]

2. Contrary to petitioner's further argument (Pet. 12-16), the decision below does not conflict with *Pizzarello* v. *United States*, 408 F. 2d 579 (C.A. 2), or *Lucia* v. *United*

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[1]The details of the affidavits are set forth in the opinion of the court of appeals (Pet. App. E 16a). The evidence upon which the assessment was based was obtained through court-approved wiretaps. In a criminal case involving petitioner, the district court denied petitioner's motion to suppress such evidence. *United States* v. *James*, Crim. No. 27962 (W.D. Ky.). Moreover, petitioner's assertion (Pet. 15) that special agents of the Internal Revenue Service are not permitted to receive evidence obtained by wiretaps was rejected in *United States* v. *Iannelli*, 477 F. 2d 999 (C.A. 3).

[2]Petitioner's allegations (Pet. 12-13) that he is unable to pay the total assessment and that collection attempts would result in his financial ruin is an insufficient basis for injunctive relief. As this Court stated in *Enochs* v. *Williams Packing Co.*, *supra*, 370 U.S. at 6, "such a suit may not be entertained merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise." In any event, as this Court has held, a suit for a refund of an excise tax, such as the wagering taxes at issue here, may be maintained with respect to any part of the "divisible" assessment in question. *Flora* v. *United States*, 362 U.S. 145, 171, n. 37; see also *Vuin* v. *Burton*, 327 F. 2d 967, 970 (C.A. 6). Thus, even if petitioner cannot pay the total assessment, he still has an adequate legal remedy. See *Bob Jones University* v. *Simon*, 416 U.S. 725, 746-748; *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 761-762. Finally, contrary to petitioner's assertion (Pet. 18), the filing of a refund suit would not deprive him of the protection of his privilege against self-incrimination. The trial of such a suit could be postponed until after the expiration of any criminal statute of limitations. See *Iannelli* v. *Long*, 487 F. 2d 317 (C.A. 3), certiorari denied, 414 U.S. 1040.

States, 474 F. 2d 565 (C.A. 5) (*en banc*). In *Pizzarello*, the court reversed a denial of an injunction against a gambling excise tax assessment which was based upon a five-year projection of wagering activity conducted by the taxpayer over a three-day period. In enjoining the assessment as excessive, the court concluded that the allegation that the taxpayer was engaged in gambling activity for five years was "unsupported either by the record or by affidavits" (*id.* at 584).

Petitioner has made no showing in this case to cast doubt upon the correctness of the assessment. Indeed, as the court of appeals stated (Pet. App. E 16a), the government's affidavits established a sufficient basis for concluding that petitioner was engaged in gambling activities over the full period of the assessment. And, in a subsequent decision, the Second Circuit made clear that *Pizzarello* does not support injunctive relief where, as here, there is a basis for concluding that the taxpayer was engaged in gambling activity during the entire period in question. *Hamilton* v. *United States*, 429 F. 2d 427 (C.A. 2), affirming 309 F. Supp. 468 (S.D. N.Y.), certiorari denied, 401 U.S. 913.

Lucia is similarly distinguishable. There, the taxpayer argued on appeal that since he stood ready to demonstrate the error of a gambling excise tax assessment based upon a projection of wagering activity over four years and eight months, the district court should not have dismissed his suit. The Fifth Circuit remanded the case for a factual determination of that claim. Unlike *Lucia*, however, here the district court did not simply dismiss petitioner's suit without an examination of the factual basis of the assessment, but granted the government's motion for summary judgment only after considering the factual foundation for the assessment as set forth in the affidavits.

Petitioner did not submit any evidence challenging the correctness of the assessment, nor did he even deny

that he was engaged in taxable gambling activities during the period in question. Nothing in *Lucia* requires that petitioner be given another opportunity to retry his suit. Indeed, the Fifth Circuit's more recent decision in *Carson* v. *United States*, 506 F. 2d 745, indicates that petitioner's failure to deny that he was engaged in the business of accepting wagers is itself a sufficient ground for distinguishing *Lucia*.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

JANUARY 1977.